

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH MUMBAI**

**BEFORE HON'BLE BR BASKARAN, ACCOUNTANT MEMBER
HON'BLE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

**ITA No. 2763/Mum/2024
(Assessment Year: 2018-19)**

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| Samit Ashok Soniminde 2302 Solitaire, Adi Shankarachary Marg Powai, Mumbai – 400076. | Vs. | ITO – 4(2)(1) Room No. 1704, 17 th Floor Air India, Bldg, Nariman Point, Mumbai – 400021. |
| PAN/GIR No. AYBPS9158C | | |
| (Applicant) | | (Respondent) |

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| Assessee by | Shri Jitendra Singh |
| Revenue by | Shri Manish Sareen, CIT (DR) |

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| Date of Hearing | 05.03.2025 |
| Date of Pronouncement | 10.03.2025 |

आदेश / ORDER

PER SANDEEP GOSAIN, JM:

The present appeal has been filed by the assessee challenging the impugned order 30.03.2024 passed u/s 263 of the Income Tax Act, 1961 ('the Act'), by the Commissioner of Income Tax (Appeal),-4 Mumbai, for the A.Y 2018-19. The assessee has raised the following grounds of appeal:

- 1. The Pr. CIT Mumbai erred in law as well as on the facts of the case in invoking the provisions of section 263 of the Act and therefore the impugned order dated 30.03.2024 passed under section 263 of Act be quashed.*

The ld. Pr. CIT Mumbai erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the A.O. failed to initiate penalty proceedings u/s 270A (9) of the Income Tax Act 1961 hence the assessment order passed by the A.O. on 18.11.2021 u/s 144 r.w.s.144C (3) of the Income Tax Act was erroneous and prejudicial to the interest of the Revenue. The very assumption of jurisdiction is contrary to the provision of law and facts of the record and same be set aside or quashed.

2. The grounds raised by the assessee relates to challenging the order of PCIT passed u/s 263 of the act. Therefore we have decided to take up all the grounds together and adjudicate the same through the present consolidated order

3. As per the facts of the present case, PCIT, while passing the order u/s 263 of the Act concluded that the assessee had misreported the income and AO should have initiated penalty proceedings u/s 270A of the Act

4. Aggrieved by the said order, assessee filed the present appeal and submitted that the PCIT had no jurisdiction u/s 263 of the Act to direct the AO to initiate penalty proceedings u/s 270A of the act and in this regard relied upon the decisions of **CIT Vs Sudarshan talkies, [1993] 200 ITR 153 (Delhi)**, and in **ITA No. 373/CHNY/2021, Coimbatore Vyapari Maathesh Vs ITO.**

5. Whereas, on the contrary, Ld. DR supported the orders passed by PCIT and submitted that section 263 of the Act can be invoked to direct AO for initiation of penalty proceedings u/s 270A of the act, which are mandatory in nature.

6. We have heard the counsels for both the parties, perused the material placed on record, judgements cited before us and also the orders passed by the revenue authorities

7. From the records, we noticed that orders under section u/s 263 of the act was passed by PCIT on the reasoning that assessee had "***misreported***" the income and AO should have initiated proceedings under section 270A of the act.

8. Now the question for determination before us is that as to whether the commissioner had jurisdiction u/s 263 to direct the AO to initiate penalty proceedings against the assessee. To our mind, the answer is "***NO***" as has been held by Hon'ble Delhi High Court in the case of a ***CIT Vs Sudarshan talkies, [1993] 200 ITR 153 (Delhi)***, and as per the decision of the coordinate bench of ITAT in ***ITA No. 373/CHNY/2021, Coimbatore Vyapari Maathesh Vs ITO***

The operative portion is contained in para no 6 to 8 and the same is reproduced here in below:

6. We have heard both the parties, perused the materials available on record and gone through the orders of the authority below. The sole basis for the PCIT to assume jurisdiction u/s.263 of the Act, is to initiate penalty proceedings u/s.270A of the Act. The provisions of Sec.270A of the Act, deals with levy of penalty for underreporting or misreporting of income. Therefore, in order to decide whether the PCIT is right in invoking the provisions of Sec.263 of the Act, and revise assessment order or not, one has to understand the additions made by the AO in the assessment order. The AO has made additions towards disallowance of cost of improvement claimed against computation of long term capital gains derived from sale of property. The AO has disallowed cost of improvement on the ground that the assessee has not furnished supporting documentary evidence to substantiate his claim towards cost of improvement. Except this, there is no observation in the assessment order regarding unsustainability of claim made by the assessee towards cost of improvement. From the above, what we understand is that although the AO has made additions towards disallowance of cost of improvement, but chosen not to initiate penalty proceedings u/s.270A of the Act, because, prima facie there is no materials with the AO to allege that there is an underreporting or misreporting of income.

7. In the above factual back ground, if you examine the reasons given by the PCIT to revise the assessment order u/s.263 of the Act, we find that the PCIT has set aside the assessment order only for the reasons that the AO has failed to initiate penalty proceedings u/s.270A of the Act, although, there is an observation of underreporting or misreporting of income. The PCIT had also relied upon the decision of the Hon'ble Allahabad High Court in the case of CIT v. Surendra Prasad Aggarwal reported in [2005] 275 ITR 113 (Allahabad) and held that the revisionary powers can be exercised for

initiation of penalty proceedings. We find that although the Hon'ble Allahabad High Court in the case of CIT v. Surendra Prasad Aggarwal (supra), has upheld 263 order passed by the PCIT for initiation of penalty proceedings, but the jurisdictional the Hon'ble Madras High Court in the case of CIT v. Chennai Metro Rail Ltd. (supra), has taken a contrary view after considering the decision of the Hon'ble Allahabad High Court in the case of CIT v. Surendra Prasad Aggarwal (supra), and held that in the absence of any findings in the assessment order regarding underreporting or misreporting of income, the PCIT cannot revise the assessment order to initiate penalty proceedings. Therefore, we are of the considered view that the PCIT has erred in invoking revisional powers u/s.263 of the Act, and set aside the assessment order to initiate penalty proceedings u/s.270A of the Act, because, the AO has chosen not to initiate penalty proceedings. The PCIT cannot substitute his views and observed that, the AO has passed erroneous order which resulted in loss of Revenue to the Department.

8. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue and thus, we are of the considered view that

the PCIT is erred in revising the assessment order u/s.263 of the Act. Hence, we quashed the revision order passed by the PCIT u/s.263 of the Act.

9. We are also of the view that the proceedings for levy of penalty are proceedings **independent and separate** from the assessment proceedings, and even as per the facts of the present case, there are **no findings recorded** in the assessment order regarding misreporting of income by the assessee. Therefore, PCIT **cannot substitute** his views and

observe that AO has passed erroneous order, which resulted in loss of revenue to the department.

10 Although Allahabad High Court in the case of **CIT Vs Suresh Prasad Agarwala** has uphold orders passed u/s 263 of the Act by PCIT for initiating of penalty. But again, the fact remains that in the case of **CIT Vs. vegetable products, 88 ITR 192 (SC)**, the Hon'ble Supreme Court ruled that when there are multiple interpretations of the taxing provisions, then the interpretation that favours the assessee should be used. Admittedly, no judgment of jurisdictional High Court has been referred or relied upon by either of the parties.

11 Therefore, considering the overall facts of the present case, and while relying upon the decision of Hon'ble Delhi High Court in the case **CIT Vs Sudarshan talkies (supra)** and the decision of Coordinate Bench in the case of **Coimbatore Vyapari Maathesh (supra)** we conclude that failure to initiate penalty proceedings would not give jurisdiction to the Commissioner of income tax to pass an order u/s 263 of the Act and direct the AO for initiation of penalty proceedings. Hence, we quash the order passed by PCIT u/s 263 of the act.

12. In the result the appeal filed by the assessee stands allowed.

Order pronounced in the open court on 10.03.2025.

Sd/-
(BR BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Mumbai, Dated 10/03/2025

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त (अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुम्बई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, मुम्बई / ITAT, Mumbai